No. 271.

Reply Br. of Maury & Cox for Pet.

Supreme Court of the United States.

OCTOBER TERM, 1898.

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JOHN McMULLEN, PETITIONER,

vs.

JULIA E. HOFFMAN, EXECUTRIX OF LEE HOFFMAN, DECEASED.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S BRIEF IN REPLY.

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The seeming determination of respondent's counsel not to concede anything to the petitioner's case has betrayed them into some serious misapprehensions and misstatements which we desire to correct, and but for which no brief in reply would have been called for, there being nothing in the argument of respondent's brief that had not been anticipated and, we think, refuted.

The Court will see that we have good right to complain of the manner in which counsel have attempted to explain away the case of Brooks *vs.* Martin (2 Wall., 70). It was quite impossible for us to be prepared for the statement made and repeated by them, (pp. 137–139,) that the articles of partnership in that case were for an innocent and lawful purpose, in the face of the finding of this Court, with all the evidence before it, that the end and object of that partnership were to traffic in soldiers' claims, contrary to the prohibition of the act of Congress, and that the *ostensible* purpose stated in the articles of association was not the real one.

After misstating the fundamental fact in Brooks *vs.* Martin, counsel ask, with some triumph, where is the similarity between that case and the one now before the court?

The efforts made by respondent's counsel to distinguish this case from Brooks *vs.* Martin and thus escape the force of that decision are advanced with much apparent seriousness, but they fall lamentably far short of accomplishing the end in view. Indeed every attempt made to combat or avoid the force of the opinion in that case only results in fastening it more securely upon the pending controversy.

Two propositions are laid down in respondent's brief in this connection: First, that the partnership in that case was to do a lawful thing, whereas the partnership in the pending case was to do an unlawful thing; and, secondly, that the violation of law in that case was not against public policy, while the violation of law in this case is against public policy.

It is true that the partnership contract in that case provided *on its face* for a traffic in land warrants and scrip, but it was alleged (and we make this assertion upon the strength

of a personal inspection of the printed record) in the answer that this was a misrepresentation of the purposes of the parties and the engagement into which they had entered, that they had agreed to operate and had actually operated in the purchase of soldiers' *claims for warrants*, and that the written contract had been studiously worded as it appeared for the express purpose of avoiding the act of Congress which forbade such business. The inherent character of the partnership contract and operations were urged by Brooks in defense of Martin's suit. Mr. Justice Miller said:

> "We think that, in point of fact, the allegation of the answer,—that the traffic in which this firm engaged was the buying up of soldiers' *claims*, before any scrip or land warrants were issued, and not the purchase and sale of bounty land warrants and scrip,—is true. We have as little doubt that the traffic was illegal."

That these operations were not in the view of the court outside of the partnership agreement, but in execution of its purposes, is made manifest a little further along in the opinion, where it is said (page 79):

> "Or if Brooks, after the signing of these articles of partnership, had said to Martin, 'I refuse to proceed with this partnership, because the purpose of it is illegal,' Martin would have been entirely without remedy. If, on the other hand, he had said to Martin, 'I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum, which I require you to advance according to your agreement,' Martin might have refused to comply with such a demand, and no court would have given either of his partners any remedy for such a refusal."

No necessity exists for any further answer to respondent's first position.

The argument advanced in this portion of respondent's brief must have been made in forgetfulness of the criticism

of McMullen's position in the pending case, found on page 107. It is there said:

> "The bill states only so much of the agreement as makes it appear to have been honest and legal; but the evidence shows that the pleader has not stated the real facts. He has omitted all that show the illegality. But this the evidence supplies. Under such circumstances, while the facts as stated in the bill might not render it demurrable, still, on a final hearing upon the evidence the facts disclose a condition just as fatal to the plaintiff's case as though he had stated the whole truth, and by so doing had plead himself out of court."

If we now parallel the two bills and the evidence taken in the two cases, the distinction between them upon the contention of respondent's own counsel is entirely imperceptible.

With regard to the second proposition, viz., that the acts of Brooks and Martin were not opposed to public policy, while the acts of Hoffman and McMullen were, we will say no more than that it is the first time we have ever heard the argument put forth that some violations of law are compatible with the good order of society, while others are not.

It is not believed that this Court will countenance the idea that the government and people of the United States had not a deep interest in the enforcement of legislation to prevent the bounty intended for the Veteran Soldier from being intercepted by speculators and sharpers, or that their solicitude for his protection was less worthy of the attention of the Courts than the principle of public policy invoked by respondent, especially when it is considered that the refusal of the Courts to enforce contracts in violation of the prohibition against dealings in soldiers' claims was the only way to give effect to the sanction of the statute

that such dealings should be "*null and void to all intents and purposes whatsoever.*"

The further position taken by counsel for respondent, that a distinction is to be drawn between Brooks *vs.* Martin and the pending case on the ground that in the first the contract between the parties was fully executed, while here it was not, is equally untenable. In this respect the two contracts were in the same condition. In Brooks *vs.* Martin all the facts touching their contract and operations were detailed in the bill, and its prayer was that the court would reinstate the contract, would appoint a receiver of the partnership property then in the possession of Brooks, would adjust the respective rights of the partners, give Martin a decree for the amount to be found due him by an investigation of all the partnership transactions, and enforce it against Brooks and the property of the firm. This is in effect just what is asked here.

Another gross misstatement is that the contract between Hoffman and the City of Portland is admitted to be void. That contract proved entirely acceptable to the City and was the basis of heavy payments of money from the City to Hoffman, some of them with full knowledge of all the developments of this case. Hoffman and McMullen performed the work called for by the contract and the City accepted and paid for the performance. It seems, therefore, inadmissible to speak of the contract as void. At the outside, the contract, if contaminated by illegality in the bidding, was merely *voidable* at the option of the innocent party, the City, which had the right to compel its performance.

Undoubtedly it was excessive partisan zeal that betrayed

the learned counsel into taking the position that respondent can challenge the validity of her testator's contract with the City, especially after the latter has, by acceptance and acquiescence, in the light of all the facts, lost the right to raise the objection. The mere fact of starting such a question here amounts to a surrender of the respondent's case.

Nor is it true that this cause is based on the contract between McMullen & Hoffman of March 6, 1893 (R., p. 492). As has been shown in our original brief, that contract merely evidenced the relation of equal partners between the contracting parties, and the mutual stipulations that the profits and losses should be equally shared between them being precisely what the law requires in such a case, it is not to the contract, but to the worthier right under the law, as by a species of remitter, that the parties would appeal in case of disagreement as to either matter.

It results, therefore, that so soon as the contemplated partnership was launched the contract of March 6, 1893, became *executed* and incapable of sustaining a suit of any kind; which completely disposes of respondent's contention that this suit is to enforce that contract.

Undoubtedly the perspicuous statement of McMullen's case required a particular reference to the partnership articles, but it is an egregious mistake to suppose that this reference made the articles a part of the gravamen of the complainant's bill. The failure to see this is the source of much erroneous discussion in the opposite brief.

The learned counsel attempt to establish an identity between contracts to commit felonies and share the fruits thereof and contracts to do things not necessarily harmful in the particular case, but objectionable because of some tend-

ency to induce a public inconvenience, as in this very case, where Hoffman's executrix is seeking to evade just responsibility by setting up illegality in the agreement with McMullen for procuring the contract with the City of Portland,—a contract which has proved beneficial to the City, and against which the City has never raised any complaint. The books are full of instances of such contracts, such as contracts to insure seamen's wages, contracts tending to create a perpetuity, contracts in restraint of trade, limitations of estates dependent on a certain person being raised to the peerage, and many others collected in the opinions in the celebrated case of Egerton *vs.* Earl Brownlow (4 H. Lds. Cas., 1), which serve to make more apparent the wide gulf that separates this class of contracts from that of contracts or conspiracies to commit felonies.

Failing to note this distinction, the Court below dignifies, by making a part of its opinion, the following extravagant attempt of the Supreme Court of North Carolina, in King *vs.* Winants, (71 N. C., 469, 474) to run a parallel between the two classes of contracts:

> "Two men enter into a conspiracy to rob on the highway, and they do rob; and, while one is holding the traveler, the other rifles his pocket of $1,000, and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a Court of justice hear them? No case can be found where a Court has allowed itself to be so abused. Now, if these robbers had taken the $1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the Court to settle up that legitimate business, the Court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of Brooks *vs.* Martin, *supra*, so much relied on by plaintiff."

Common sense revolts at the bare suggestion, that Brooks *vs.* Martin and the supposed case stand on the same footing. The latter relates to a heinous crime, destructive of the public peace and the sacred principle of property—a crime leveled at the very fabric of government, and belonging to a class where the earlier law allowed no civil redress to the individual injured against the wrongdoer, and where the later law suspends the right to such redress until after the wrongdoer shall have been convicted or acquitted of the offense charged. (See Higgins *vs.* Butcher, Yelv., 90*a*, note 2, Metcalf's Ed., Andover, 1820.)

If now the offense to the party robbed, in the case supposed, became, at common law, drowned or merged in the "offense to the Crown," it may well be questioned whether any action would lie by one participant in the robbery against the other for his share of the fruits of the crime, under any circumstances whatever.

In King *vs.* Winants (*supra*) the plaintiff and defendant agreed not to bid against each other for a government contract to be given to the lowest bidder, and to share the profits of the contract when given to one of them, and the contract having been awarded to the defendant it was held that the plaintiff could not maintain an action to bring him to an accounting for the profits, the contract being against public policy and void.

It is to be noted that the court were not unanimous, Rodman, J., having dissented on the grounds that "*this case cannot be distinguished from Brooks vs. Martin*, 2 Wall., 70," and that "*the plaintiff can make out his case without going into proof of the fraudulent transactions.*"

Now it is in this case that we find the genesis of the idea,

that before an action can be maintained, for the division of the profits of an illegal contract, by one party to the contract against another, there must have been some transformation of those profits into something different from what they were when first earned. Nor is it remarkable that a court, unable to perceive the difference between an action for the profits of a contract to commit a felony and one for the profits of a contract to do something not necessarily harmful or objectionable in itself, but having a tendency more or less detrimental to the public good, should have advanced this doctrine of transubstantiation, and then argued itself into the conviction that it was only enforcing the doctrine of Brooks *vs.* Martin.

The court below having been captivated by the parallel instituted by the North Carolina court between actions to share profits earned under contracts to commit felonies, and similar actions under contracts against public policy, naturally fell a victim to the auxiliary doctrine of transubstantiation, and, as the former court had done, attempted to explain away Brooks *vs.* Martin and other decisions of this court of the same character.

It is true some of the scrip, in that case, had been regularly assigned by the soldier himself, or had been located on public land, some of which had been sold and conveyed away, and notes and mortgages taken for the unpaid purchase-money, but clearly these were *purely adventitious circumstances*, noticed, to be sure, by the Court, but not entering into the *ratio decidendi* of its decision.

As this Court says, remarking on the case of Tenant *vs.* Elliot (1 B. & P., 3), "the plaintiff recovered, on the ground that the implied promise of the defendant arising out of the

receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction" (McBlair *vs.* Gibbes, 17 How., 232, 236), thus effectually disposing of the new-born theory that the fruits of an illegal enterprise must undergo some transformation before any duty to share them with another will support an action.

This single remark of the Court shows that if none of the particular circumstances in Brooks *vs.* Martin had existed the decision of that case must have been the same as it was.

Returning now to the case at bar, the moment the money earned by McMullen and Hoffman came into the hands of the latter, the law implied a contract on his part to pay McMullen his share of it. This implied contract was wholly independent of the express contract, said to be infected with illegality, and made it entirely feasible for McMullen to bring Hoffman to an accounting, without invoking the so-styled illegal contract. It is a *concessum* that if Hoffman had admitted his liability to account to McMullen or had expressly agreed to pay him his share of the profits after receiving them, a bill, like the present one, would have been maintainable, which gives up the case, because the contract, which the law implied in favor of McMullen, has all the potency of an express undertaking, being, as this Court say in McBlair *vs.* Gibbes (*supra*), "*not affected by the illegality of the original transaction.*" (See also Planters' Bank *vs.* Union Bank, 16 Wall., 483, 499, 500, and Armstrong *vs.* Toler, 11 Wh., 258.)

On pages 127 and 128 of respondent's brief, the assertion is in effect made, in an argument attempting to uphold the circuit court of appeals, that an express promise will support an action to recover a share of profits derived from the per-

formance of a void contract, while the law will not raise an implied promise from such conditions. This contention is irreconcilable with the decision in the case of Planters' Bank *vs.* Union Bank (16 Wall., 483, 499), where it is said:

> "It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the Court will not unravel the transaction to discover its origin."

To this should be added the important consideration that the profits for which it is sought to hold Hoffman's estate accountable are not the wages of iniquity, as in the cases relied on by respondent, but the meritorious fruits of labor and capital expended in establishing a water supply for a city.

The persistency with which respondent's counsel refuse to see the distinction between a case where the illegal contract is the cause of action and a case where the relation of such contract to the action is only incidental and collateral, is truly remarkable.

In the latter case the contract is looked at by the Court for the mere purpose of ascertaining whether the plaintiff and defendant hold such a relation towards one another as will warrant the implication of an assumpsit by the defendant to pay the plaintiff some part of the fruits of the illegal adventure, but the action itself rests entirely on the duty of the defendant to the plaintiff raised by operation of law. This is clearly shown by Chief Justice Cooley, speaking for

the Court in the case of Willson *vs.* Owen (30 Mich., 474), where the treasurer of an association organized for illegal purposes sought to defeat an action by his associates for their share of the earnings, by setting up the unlawfulness of the enterprise, but without success, the Court saying:

> "The illegality of this association ONLY APPEARS INCIDENTALLY IN EXPLAINING WHENCE THE MONEYS WERE RECEIVED; but the ground of recovery is that the moneys were received for the plaintiffs, and it is not material how or on what account they came to his hands, if in fact for the plaintiffs' use. The distinction between such a case and one in which the suit seeks the enforcement of the illegal contract is well pointed out by Mr. Justice Nelson in McBlair *vs.* Gibbes, 17 How., 235, 239."

In Frost *vs.* Plumb (40 Conn., 111), the Court say that if the plaintiff can show "a complete cause of action without being obliged to prove his own illegal act, ALTHOUGH SUCH ILLEGAL ACT MAY INCIDENTALLY APPEAR, AND MAY BE IMPORTANT EVEN AS EXPLANATORY OF OTHER FACTS IN THE CASE, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal."

Both the learned Court of Appeals and the counsel for respondent fail to note the radical difference between the class of cases to which Atchison *vs.* Mallan belongs and the class to which the case at bar belongs.

In Atchison *vs.* Mallon there was no way by which the plaintiff's object could be obtained but through an illegal executory contract. The case stood on precisely the same basis as Thomson *vs.* Thomson (7 Ves., 473), where Sir Wm. Grant seemed to lament that there was nothing "collateral" to the illegal agreement on which a "collateral demand" could arise.

Besides, in Atchison *vs.* Mallon, as in Thomson *vs.* Thom-

son, there was an agreement to divide the salary of a public office, which was alone sufficient to condemn the contract.

In neither of those cases was there anything in the hands of the defendant on which a specific trust could be fastened, or from which the law would imply, *ex æquo et bono*, an assumpsit collateral to the contract.

If in either of them the defendant had held money the product and fruit of the property or capital of the plaintiff and was refusing to account to plaintiff for his share of it, on the ground that the same was the result of an executed illegal contract, undoubtedly there would have been present something "collateral" which would have warranted the Court in making the defendant a trustee *in invitum*.

Turn again now to Brooks *vs.* Martin. Brooks had a considerable amount of property in his hands which was the fruit of Martin's capital. The illegality which, it is alleged, infected their transactions was past and gone, and the property Brooks held was in part the property of Martin, and therefore equity fastened a trust on it for Martin's benefit, on the great principle of general jurisprudence that no one should be allowed to enrich himself at the expense of another.

The illegality being out of the way and a thing of the past, why should the party in possession have been allowed to rob his associate?

Now the case at bar is on all fours with Brooks *vs.* Martin. Hoffman's estate claims to hold on to all the profits of a contract of which McMullen and the respondent's testator were joint owners. The illegality set up in defence being a thing of the past, why should Hoffman's estate be allowed

to rob McMullen of his share of the joint property any more than Brooks should have been to despoil Martin?

If in Atchison *vs.* Mallon the defendant had paid over to a third party a sum of money to be handed to Atchison, clearly such third party could not have successfully resisted a suit by Atchison for its recovery, on the score of illegality in the original agreement.

A number of decisions in addition to those whose introduction was anticipated in our principal brief have been submitted by counsel for respondent, perhaps those most relied upon being Hunter *vs.* Nolf, 71 Penn. St., 282; Hyer *vs.* Richmond Traction Co., 80 Fed., 83; Morrison *vs.* Bennett, 52 Pac., 553; Hunter *vs.* Pfeiffer, 9 N. E., 124. These cases all present instances where the promise sought to be enforced had as its foundation an illegal consideration, and we think this is true of all the authorities cited by respondent's counsel. We trust we have already made plain the distinction between such cases and the one at bar.

In Sharp *vs.* Taylor (2 Phill. Ch. R., 801, 818), a case relied on by this Court in Brooks *vs.* Martin, the Lord Chancellor says, in delivering judgment:

> "As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? In this particular suit, can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can shew that, in realizing it, some provision in some act of Parliament has been violated or neglected? Can one of two partners, in any import trade, defeat the other, by shewing that there was some irregularity in passing the goods through the custom-house? The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do, as between the parties."

It would seem impossible to deny, with success, that the case at bar falls within the principle laid down in Brooks *vs.* Martin and Sharp *vs.* Taylor and the cases therein cited.

The principle on which the Courts proceed is, that the dishonest defense of illegality is not to be countenanced when raised too late to arrest performance of the illegal purpose. It is for the vindication of the law and not out of regard for the defendant that the defence is entertained. But if it should be allowed after the illegal act has been done, it would not be then for the sake of the law but for the sake of the defendant alone, who is an abomination in the sight of the law. The defence is, at best, demoralizing, but it is the lesser evil. To countenance it, however, after the greater evil has passed beyond temporal correction, would be deplorable. The mischief to law has then been done, the past cannot be recalled, and, therefore, nothing remains but to enforce fair dealing between the parties who claim to share the fruits of the illegal transaction.

This idea is forcibly put by Mr. Justice Miller in Brooks *vs.* Martin. He says:

> "It is difficult to perceive how the statute, enacted for the benefit of the Soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so. * * * The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the Court in this case."

And it is pertinently asked by the Court, in another case: "Why should one of the co-workers be permitted to add *a fresh iniquity*, by retaining the whole, contrary to his agreement?" (Owen *vs.* Davis, 1 Bailey (Law), 315).

To allow the defence of illegality under such circumstances would be "*to exercise rigor beyond the limits of wholesome severity* (Harvey *vs.* Varney, 98 Mass., 123), and "TO ENCOURAGE HYPOCRISY AND GROSS DISHONESTY" after all the harm that can be done to the public by an infraction of law has already occurred (Gilliam *vs.* Brown, 4 Miss., 664).

Before leaving this branch of the case we deem it proper to correct a mistake of fact into which counsel for respondent has fallen. In our principal brief we set forth the contract of March 6 in which occurs this passage:

> "It is further hereby agreed that if either of the parties hereto shall get a contract for doing *or do* any other part of the work let or to be let by said committee for bringing Bull Run water to Portland the profits and losses thereof shall in the same manner be shared and borne by said parties equally share and share alike."

It is asserted by counsel for respondent that we have misquoted the contract, its language being said to be "or to do" instead of "or do," the implication being that the whole stipulation was addressed only to specific contract work, and that McMullen was to have no interest in any other work performed on the water system. We do not think the point possesses any merit, but it is the respondent's counsel who has misquoted the contract and not we. (See Record, pp. 492–'3.)

THE CONTENTION THAT MC MULLEN FORFEITED HIS INTEREST IN THE PARTNERSHIP.

The flimsiness of this contention is shown by attention to the real facts.

The basis of the partnership between McMullen and Hoffman was the contract between the City of Portland and Hoffman and Bates.

The contract was, undeniably, a valuable asset, and mainly the product of the efforts of McMullen. That McMullen was largely instrumental in securing the contract is shown by the fact that he had a half interest in it and that Hoffman was to bear the whole burden of superintending the work to be done under it.

This was but a fair return for his services and for the great expense to which he had been put in supplying the necessary estimates and data on which the bidding was to be based, and, undoubtedly, all would have gone well but for the difficulty, at first, of floating the bonds of the City.

In the presence of these facts, could a more extreme proposition be started than the contention, gravely relied on, that Hoffman has deprived McMullen of his half interest in this valuable asset simply by reading him out of the partnership because, as he fraudulently pretended, McMullen had not come to his relief when he needed money to meet the expenses of executing the contract?

No such proposition finds support anywhere. Mr. Lindley, a recognized authority, lays down the law, as follows:

> "In the absence of an express agreement to that effect, there is no right on the part of any of the members of an ordinary partnership to expel any other member. Nor, in the absence of express

> agreement, can any of the members of an ordinary partnership forfeit the share of any other member, or compel him to quit the firm on taking what is due to him. As there is no method except a dissolution by which a partner can retire against the will of his copartners, so there is no method except a dissolution by which one partner can be got rid of against his own will" (p. 616).

It is thus not by *ejection* but by *dissolution* that an objectionable partner can be gotten rid of, and dissolution means the *due accounting and adjustment of rights between the former partners*, but the odious idea of forfeiture does not enter into it.

It is not necessary, however, to consider whether Hoffman succeeded in effecting a legal dissolution of the concern, by refusing to recognize McMullen any longer as a partner, because *the latter's rights would be the same either way*, as was held by this Court, in the precisely similar case of Karrick *vs.* Hannaman (168 U. S.), where one partner ousted his copartner from the concern and took the business into his own hands exclusively, and carried it on successfully.

In holding that the excluded partner had the right to share in the profits of the business as completely as though nothing had happened, the Court said:

> "Even if the partnership should be considered as having been actually dissolved at that date, yet the dissolution did not put an end to the plaintiff's right to his share in the property and the profits of the partnership. In a case in which both parties, in their pleadings, assumed the partnership to have been dissolved, this Court, speaking by Mr. Justice Miller, held that drunkenness and dishonesty on the part of one partner and his consequent exclusion from the business did not authorize his copartner, 'of his own motion, to treat the partnership as ended and to take himself all the benefits of their joint labors and joint property,' or exempt him from responsibility to account to the excluded partner (*Ambler vs. Whipple*, 20 Wall., 546, 555, 557). And in a later case, the Court, speaking by Mr. Justice Woods, said: 'However the question may be decided, whether one partner may by his own mere will dissolve a partnership formed for a definite purpose or

> period, it is clear that upon such a dissolution one partner cannot appropriate to himself all the partnership assets, or turn over the share of his partner to another with whom he proposes to form a new partnership' (*Pearce vs. Ham*, 113 U. S., 585, 593)."

It must be conceded that the rulings of this Court in Karrick *vs.* Hannaman and in the preceding cases of Ambler *vs.* Whipple and Pearce *vs.* Ham, referred to in the above quotation, conclusively settle the right of McMullen to compel Hoffman's estate to account for one-half of the profits earned under the contract with the City of Portland.

Aside from the letters of Hoffman there is nothing in the case to countenance his claim that an occasion really existed for the call on McMullen to furnish $10,000 to meet expenses under the contract. On the contrary, there is some ground for saying that Hoffman was seeking a pretext for getting rid of McMullen altogether.

Certainly the conditions were favorable for the successful working of such a plan. Hoffman lived in Portland and had exclusive charge of the work, as had been arranged between him and McMullen, who lived and was engaged in business in San Francisco, and was, therefore, completely dependent on Hoffman for information as to the state of their joint business in Portland.

Hoffman having, for his own gain, turned State's evidence against McMullen, by setting up the defence of illegality, it is not perceived that he is on a better footing, as to credibility, than any other accomplice who betrays his confederate for an advantage to himself. "The acknowledged turpitude of the witness," says Mr. Starkie, "must necessarily stamp his testimony with suspicion."

But these letters of Hoffman's, so much relied on by re-

spondent, are only evidence in so far forth as they explain the meaning of McMullen's letters in reply to them, and no farther.

As has been fully shown in our original brief, (pp. 213, 214,) there was no foundation in fact for the urgent demands made by Hoffman on McMullen for money to meet the September expenses; and as those demands occurred at a time when the business of the whole country was almost paralyzed by a financial panic, the inference is that their object was, we repeat, to force McMullen out of the partnership, by requiring of him what was an impossibility, under existing conditions.

As it was the admitted understanding between McMullen and Hoffman that the latter should carry on the work on the contract, and as the record shows, beyond question, that the monthly payments made by the City to Hoffman for September, 1893, and each succeeding month were sufficient to meet all the expenses of the work up to date and leave a handsome balance in Hoffman's hands after each payment, it is difficult to understand on what ground it is charged that McMullen was slack in performing his duty under the partnership articles. It will not be denied that McMullen furnished an important part of the plant necessary to the execution of the contract, and the record fails to show any pretext for putting an end to the partnership except McMullen's failure to respond to the unreasonable and unjustifiable demand for $10,000, in September, 1893. If before that date McMullen was remiss, Hoffman had unquestionably condoned his conduct.

Without wasting words upon the untenable proposition that McMullen acquiesced in Hoffman's effort to exclude him

from the firm, that being immaterial to the case, it may be said without fear of contradiction that there is nothing in the record to show that McMullen was guilty of the folly of renouncing his right to bring Hoffman to an accounting as trustee for all the profits earned under the contract.

To say that Hoffman was liable for profits up to the time of the so-styled dissolution, and no further, seems extreme, for why should McMullen be debarred from sharing the profits thereafter earned on the contract which he had done so much to obtain and of which he was half owner? Counsel are prudently silent with reference to this effort at spoliation on Hoffman's part, which, as viewed from this standpoint, must be condemned both at law and in equity. Clearly there is nothing short of the bar of the statute of limitations that could, under any imaginable circumstances, prevent McMullen from maintaining a bill for an account and for relief against Hoffman, treating him as a constructive trustee.

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